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No. District Ct. #06-22504-CV-PCH

USCA No: 07-12320-E

IN THE

SUPREME COURT OF THE UNITED STATES

Javier Lopera PETITIONER

VS.

United States RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals, 11th Circuit

PETITION FOR WRIT OF CERTIORARI

Javier Lopera 69502-004
Northwest Ohio Correctional
2240 Hubbard Road
Youngstown, Ohio 44505-315

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is not published.

The opinion of the United States district court appears at Appendix A to the petition and is not published.

All parties appear in the caption of the case on the cover page.

JURISDICTION

The date on which the United States Court of Appeals decided my case was 9/24/2007

No petition for rehearing was filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Sixth Amendment of the U.S. Constitution

QUESTION(S) PRESENTED

I. Whether under the principles and precedents of the U.S. Supreme Court Mr. Lopera is entitled to at least an evidenciary hearing, at which live testimony will be taken to develop facts that greatly support the claim he advances.

II. Whether or not councel's conflict of interest in this case was unwaivable and was per se violation of the Sixth Amendment, requiring a new trial without a showing of prejudice.

STATEMENT OF THE CASE

When an ineffectiveness claim is predicated on an alleged conflict of interest, the petitioner must show that (1) defense counsel labored under an actual conflict of interest; and (2) the actual conflict "adversely affected" the lawyer's performance. See Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir.1987) (per curiam) (citations omitted). The advice of counsel that Lopera waive his right to testify in his own defense is fatally tainted because lead trial counsel operated under an unwaivable actual conflict of interest even according to the government. See Petition at pp. 8-10.

REASONS FOR GRANTING THE WRIT

An unwaivable conflict of interest implicates the Sixth Amendment and "makes a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 481

(2000) (court should issue a certificate of appealability for only those claims as to which the petitioner has made a "substantial showing of the denial of a constitutional right"). The one-page order issued by a single Eleventh Circuit court judge, which denied the requested "certificate of appealability," see Appendix A, must be reversed and the case remanded to the Eleventh Circuit for full appellate review. For these reasons, the Petitioner should be granted the writ and the requested "certificate of appealability."

I. BACKGROUND

On March 21, 2003, Defendant/Appellant Javier Lopera (hereafter Lopera), an attorney specializing in immigration law, was charged in a nineteen count Superseding Indictment with one count of conspiracy to make false statements, engage in visa fraud, and harbor aliens, in violation of 18 U.S.C. §§ 1001 and 1546(a) and 8 U. S.C. §§ 1324(a)(1)(A)(iii) and 1324(a)(1)(B)(I), all in violation of 18 U. S.C. § 371 (Count 1); eleven counts of making false statements in matters within the jurisdiction of the Immigration and Naturalization Service (hereafter INS), in violation of 18 U.S.C. §§ 1001 and 2 (Counts 2 through 12) and seven counts of harboring aliens, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iii) and 1324(a)(1)(B)(I) (Counts 13 through 19). The Superseding Indictment alleged that the conduct began in about August 2000 and ended on or about February 19, 2003 (Case No. 02-20867-

CR-HUCK, DE #23).

Following a jury trial, Lopera was sentenced on August 28, 2003 to a total of 100 months imprisonment to be followed by a three-year term of supervised release. Lopera's convictions and sentence were affirmed on direct appeal on July 8, 2004. See United States v. Lopera, Case No. 03-14650. However, because the judgment contained a clerical error in stating that Lopera was convicted of "8 U.S.C. § 1324(b)(1)(B)(I)" instead of "8 U.S.C. § 1324(b)(1)(B)(i)," this Court vacated and remanded with instructions for the district court to replace "(I)" and "(i)." The sole issue he raised on appeal was whether harboring under 8 U.S.C. § 1324(a)(1)(A)(iii) includes employing illegal aliens, failing to take deductions from their paychecks, and filing false documents on their behalf.

Subsequently, Lopera timely filed a petition for panel rehearing arguing that the imposition of sentence

enhancements in this case violated Blakely v. Washington, 124 S. Ct. 2531 (2004). This Court denied Lopera's petition for rehearing.

Thereafter, Lopera filed a petition for certiorari in the United States Supreme Court. In Lopera's petition for certiorari, he raised one issue, namely that his sentence enhancements were based on facts found by a judge, by a preponderance of the evidence, in violation of Blakely, supra. On January 24, 2005, in Lopera v. United States, Case No. 04-6949, the United States Supreme Court vacated this Court's decision and remanded the case to this Court for further consideration in light of United States v. Booker, 125 S. Ct. 738 (2005).

Subsequently, on May 11, 2005, after supplemental briefing, this Court rejected Lopera's challenges to his sentence which were predicated upon Blakely, supra, and Booker, supra, holding that Lopera had waived these

arguments because he failed to raise them in his initial brief. In that May 11, 2005 Order, this Court reinstated its previous opinion in this case and affirmed Lopera' conviction and sentence. Once again this Court noted in its order that, because the judgment contains a clerical error in stating that Lopera was convicted of "8 U.S.C. § 1324(b)(l)(B)(I)" instead of "8 U.S.C. § 1324(b)(1)(B)(i)," this Court vacated and remanded with instructions for the district court to replace "(I)" and "(I)."

On or about August 9, 2005, Lopera again filed a petition for certiorari in the United States Supreme Court, Case No. 05-5788, on the basis that this Court's rule that a party who fails to raise a "Booker-related" issue in his initial brief is not entitled to Booker relief conflicts with the law of other Circuits, is unfair and legally unsound. On October 11, 2005, this petition for a writ of certiorari to the United States Supreme Court by Lopera was denied.

On May 11, 2005, Lopera timely filed a motion under 28 U.S.C. § 2255 in the U.S. District Court for the Southern District of Florida. On March 20, 2007, the Court denied Lopera's Section 2255 motion. On May 17, 2007, Lopera timely filed a notice of appeal.

II. THE STANDARDS GOVERNING CERTIFICATES OF APPEALABILITY

The standards governing the issuance of certificates of appealability were discussed by the United States Supreme Court in Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).[1] The eight-member majority opinion began by re-affirming the basic criteria set forth in Slack v. McDaniel, 529 U.S. 473 (2000), i.e., that a petitioner" need only demonstrate 'a substantial showing of the denial of a constitutional right'

— a showing that is satisfied "by demonstrating that jurists of reason could disagree with the district court's resolution of

his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Cockrell, 123 S.Ct. at 1034, quoting Slack, 529 U.S. at 484. The Supreme Court, however, dissagreed with the Fifth Circuit's application of this standard.

In reversing the Fifth Circuit's denial of a certificate of appealability, the Supreme Court emphasized that the Slack standard "does not require a showing that the appeal will succeed" and that an application should not be denied simply because the court "believes the applicant will not demonstrate an entitlement to relief." Id. at 1039. The certificate requirement is merely a "threshold, or gateway, test" and does not even require that a petitioner show

---

[1]Although the Supreme Court in Cockrell was considerig the standards in the context of a habeas petition filed by a state prisoner under 28 U.S.C. § 2254, the same standards apply to Lopera's motion to vacate filed under 28 U.S.C. § 2255.

"that some jurists would grant the petition for habeas corpus." Id. at 1040. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id.

Lopera's § 2255 motion and related pleadings in the district court alleged, among other things, that his constitutional right to the effective assistance of counsel was violated because he had an unwaivable conflict of interest with his lead trial counsel and did not waive that conflict of interest which warranted an evidentiary hearing. Although the district court has ruled against him on this claim, it is, at the very least, "debatable" and thus deserving of appellate review. We limit this request to this one claim.

III. LOPERA IS ENTITLED TO A CERTIFICATE OF APPEALABILITY

A. This Court Should Issue A Certificate

Of Appealability On Lopera's Claim That His Constitutional Right To The Effective Assistance Of Counsel Was Violated Because He Had An Unwaivable Conflict Of Interest With His Lead Trial Counsel And Did Not Waive That Conflict Of Interest And This Claim Warranted An Evidentiary Hearing.

The ineffective assistance of counsel issue raised by Lopera plainly warrants the issuance of a certificate of appealability. The arguments in support of this issue set forth in Lopera's Section 2255 Motion and Supporting Memorandum of Law, his Reply Memorandum, his Objections To and Appeal From the Magistrate's Report and Recommendation and his Supplemental Objections to the Magistrate's Report are, at the very least, "debatable" and thus deserving of appellate review. Mr. Lopera relies upon

all of these previous submissions filed by him in the district court in support of this application for a certificate of appealability.

Mr. Lopera's ineffective assistance of counsel claim is that (1) he was denied effective assistance of trial counsel because (a) the conflict of interest with his trial attorney, Walter Reynoso, was unwaivable and was a per se violation of the Sixth Amendment; (b) there was an actual conflict of interest which had an adverse effect on attorney Reynoso's performance; and (c) the waiver colloquy regarding this conflict of interest that was conducted in the district court was insufficient. This claim is deserving of appellate review.

A. **Counsel's Conflict of Interest in This Case Was Unwaivable and Was a Per Se Violation of the Sixth Amendment.**

It is important to note that the Magistrate expressly

found "that there was an actual conflict of interest at trial." Magistrate's Report and Recommendation at 8 (hereinafter "Magistrate's R & R").[2] In so finding the Magistrate explained:

> The undersigned finds that there was an actual conflict of interest at trial. While the District Court did not admit the Rule 404(b) evidence, if Lopera had testified, that evidence may well have been admitted to impeach Lopera's credibility. This would have brought attorney Reynoso's name into the case.
>
> Id.

---

[2]The trial judge adopted by reference the findings of fact and conclusions of law of the Magistrate. See "Order Denying Motion to Vacate" at 2.

However, the Magistrate rejected Mr. Lopera's claim that this actual conflict of interest was unwaivable and was a per se violation of the Sixth Amendment. Notably, in rejecting this claim, the Magistrate ignored that, in the government's motion to disqualify Mr. Lopera's trial counsel filed prior to the trial, (DE 57 at 6),[3] the government's objection to the magistrate judge's order denying this motion to disqualify (DE 78) and the government's oral arguments concerning this motion to disqualify,

> (T1-18-19)[4] the government conceded that the conflict of interest with Mr. Reynoso was unwaivable.

Furthermore, the United States Supreme Court in Wheat v. United States, 486 U.S. 153 (1988), the Courts of

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3"DE" refers to the docket entry number of the cited document.

Appeal in United States v. Williams, 372 F.3d 96, 102 (2nd Cir. 2004), United States v. Fulton, 5 F.3d 605, 611 (2nd Cir. 1993) and United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984) and the district court in United States v. Urbana, 770 F.Supp. 1552 (S.D.Fla. 1991) have recognized that certain attorney conflicts of interest are so severe that they are unwaivable. In Williams, Fulton, Cancilla and Urbana the Courts held that, where it is alleged that trial counsel is implicated in the same or closely related criminal conduct for which the defendant is on trial, the conflict of interest is so severe that it is a per se conflict of interest that is unwaivable and requires a new trial without a showing of prejudice.

---

[4] The transcript of the May 12, 2003 hearing on the government's motion to disqualify will be referred to herein as "Ti ."

The Magistrate acknowledged this rule and this case law but rejected it stating that "the Eleventh Circuit has not adopted this rule. See United States v. Pegg, 253 F.3d 1274, 1279 (11th Cir. 2001) cert. denied, 535 U.S. 970 (2002)." Magistrate's R & Rat 12. This statement of the Magistrate indicates that this Court has rejected this rule when, in fact, this Court has expressly acknowledged that "there may be circumstances under which a per se rule [of an unconstitutional conflict of interest] should be applied...." Pegg, 253 F.3d at 1279.

The Magistrate additionally found that, if the per se rule applied, the conflict would not fall within the ambit of that rule "because attorney Reynoso's conflict of interest was not related to the crimes with which Lopera was charged" and because "the government did not claim that Reynoso intentionally committed fraud in these acts...." Magistrate's R & R at 12. These factual conclusions are incorrect.

Indeed, Mr. Lopera explained in his Motion to Vacate at 5-9, that, in the government's motion to disqualify counsel and its memorandum of law in support thereof, the government plainly asserted that Reynosa participated with Mr. Lopera in the exact same type of immigration fraud as that charged in the indictment. Mr. Lopera additionally explained in that same Motion to Vacate at 5-9 that in these same governmental submissions, the government alleged that Reynosa submitted immigration forms on behalf of Lopera which were "fraught with fraud" because Reynoso represented on these forms that Mr. Lopera worked for his law office as a paralegal during certain time periods when, in fact, Mr. Lopera was never employed there. Reynoso necessarily would have known whether or not Mr. Lopera worked for his law office as a paralegal at the time that Reynosa stated on the immigration forms that Mr. Lopera worked there. Therefore, the plain import of these governmental submissions was that Reynoso intentionally made these false statements.

For all these reasons, the Magistrate's ruling, adopted by the district court, that the per se rule did not apply to this case and that the conflict here would not fall within the ambit of that rule is, at the very least, "debatable" and, therefore deserving of appellate review.

B. Actual Conflict of Interest.

Without conducting an evidentiary hearing, the Magistrate made the following findings:

> The undersigned finds that Lopera has not shown why his testimony at trial would have constituted a plausible alternative defense strategy or tactic. The undersigned also finds that there was no link between the actual conflict and Lopera's decision not to testify, as the trial record shows that before deciding not to testify, Lopera consulted both with attorney Reynoso and with

attorney Flynn, who was an independent counsel.

Magistrate's R & R at 8. These findings are inaccurate and were improperly made without first conducting an evidentiary hearing.

In his Motion to Vacate at 4, Mr. Lopera stated, inter alia, as follows:

> Immediately after the arrest of Mr. Lopera, Walter Reynoso entered a permanent appearance on his behalf Because of the sheer magnitude of the case, Mr. Reynoso told Mr. Lopera that he (Reynoso) would need assistance
>
> from attorney Vincent Flynn but it was always agreed and understood by Reynoso, Flynn and Mr. Lopera that Mr. Reynoso would be lead

> counsel and assume the primary responsibility for pre-trial preparation and trial strategy and decision making.5
>
> Because Mr. Reynoso brought Mr. Flynn into the case, Mr. Flynn's allegiance was first and foremost to Reynoso,Mr.Reynoso "called the shots" and ultimately made all of the strategic decisions regarding Mr. Lopera's case. (emphasis added).

---

5 As explained in the Motion to Vacate, attorney Scott Srebnick also assisted Reynoso and Flynn in the defense, but Mr. Srebnick was not retained to represent Mr. Lopera at trial and did not enter a permanent notice of appearance. (continued..)

The Magistrate erred in summarily finding that attorney Flynn was an "independent counsel" when Mr. Lopera plainly claimed the contrary in his Motion to Vacate. Mr. Lopera should have been given the opportunity to present evidence regarding this matter at an evidentiary hearing.

Indeed, at such a hearing, that evidence would have included the alleged fraudulent letter relied upon by the government in its pre-trial attempt to disqualify Reynosa written to the Immigration and Naturalization Service by Reynosa confirming a job offer for Mr. Lopera as a paralegal the letterhead of which listed Vincent J. Flynn as "of

---

[5](...continued)Reynosa used Srebnick as an independent contractor to prepare and argue motions on behalf of Mr. Lopera. Because Reynosa brought Srebnick into the case, Srebnick worked for Reynosa on the case and was not "independent" counsel, as the Magistrate improperly summarily found.

counsel" to the Law Offices of Walter A. Reynoso, P.A. A copy of this letter which is dated March 22, 1996 was attached to Mr. Lopera's Supplemental Objections to the Magistrate's Report. Notably, this was the same letter that the government claimed prior to Mr. Lopera's trial was "fraught with fraud."

Congress has directed that a trial court must hold an evidentiary hearing on an otherwise facially valid claim under 28 U.S.C. § 2255 unless the record conclusively establishes that the prisoner is not entitled to relief. 28 U.S.C. § 2255 ¶2; see Hodges v. United States, 368 U.S. 139 (1961). As it presently exists, this record does not conclusively establish that Attorney Flynn was independent counsel who advised Mr. Lopera that he should not testify.

"A district court must grant an evidentiary hearing on a petitioner's Section 2255 motion if there is a factual dispute and the petitioner's version, if true, would warrant

relief." United States v. Hammond, 50 Fed.Appx. 363, 365 (9th Cir. 2002). Accord Bruce v. United States, 256 F.3d 592, 597 (7th Cir. 2001)("[a] district court ...must grant an evidentiary hearing if the petition alleges facts that, if proven, would entitle him to relief. ..."). Reynoso's self-serving statement at the trial that he and Flynn "discussed" with Mr. Lopera the decision of whether or not to testify begs the question of who ultimately advised Mr. Lopera as to what that decision should be. See Magistrate's R & R at 10-11. Mr. Lopera's claim that Reynoso - not Mr. Lopera - made that decision and that Flynn's allegiance was first and foremost to Reynoso should not have been rejected without an evidentiary hearing.

Furthermore, the Magistrate's finding that the conflict of interest did not have an adverse effect on attorney Reynoso's performance because "Lopera has not shown why his testimony at trial would have constituted a plausible alternative defense strategy or tactic" was erroneous. See Magistrate's R& R at 8. The government's theory of

prosecution that fraudulent INS applications were prepared with Mr. Lopera's knowledge and Mr. Lopera's theory of defense that he did not knowingly and willfully participate in the preparation of the fraudulent INS applications were described in detail in Mr. Lopera's Motion to Vacate at 5-8. Obviously, if he had testified, he would have intended to testify consistent with his theory of defense. It was a plausible alternative defense strategy for Mr. Lopera to testify consistent with his theory of defense. See e.g. Rubin v. Gee, 292 F.3d 396 (4th Cir. 1002)("plausible alternative defense strategy" existed where defendant "might have been helped" by two witnesses testifying); Reyes-Vejerano v. United States, 276 F.3d 94, 97 (1's Cir. 2002)("It was a plausible (though likely unwise) alternative defense strategy for [defendant] to take the stand and testify he was innocent."). Furthermore, there is nothing in the record that foreclosed Mr. Lopera testifying as a plausible alternative

defense theory. Indeed, he was an attorney with no criminal record. The Magistrate's finding that his testimony at trial would not have constituted a plausible alternative defense strategy without even conducting an evidentiary hearing was patently erroneous and, at the very least, warrants appellate review. See e.g., Hammond, supra; Bruce, supra.

C. Waiver.

Mr. Lopera objects to the trial court's finding that he waived any conflict of interest for several reasons. First, the trial court erroneously ignored Mr. Lopera's claim that, because the government did not notify him of the conflict of interest in a timely fashion, the government should be estopped from arguing his alleged waiver was knowingly and intelligently exercised. See United States v. Williams, 372 F.3d 96, 108 (2d Cir. 2004). Second, the trial court erroneously ignored Mr. Lopera's claim that the government waived any waiver argument when it argued to the district

court that Reynoso's conflict of interest was unwaivable. Third, for the reasons stated in Mr. Lopera's motion to vacate and supporting memorandum of law and his reply memorandum of law in support of his motion to vacate, the trial court erred in finding that Mr. Lopera knowingly and intelligently waived the conflict. Accordingly, this issue of waiver is also, at the very least "debatable" and, therefore, deserving of appellate review.

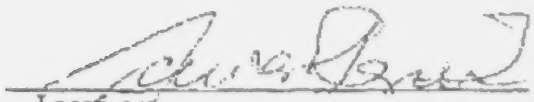
Conclusion

For all the foregoing reasons Petitioner submits that the order of the lower Court issued by a single 11th Circuit Court judge on September 14, 2007 denying Petitioner the requested "Certificate of Appealability" must be reversed and the case remanded accordingly.

Petitioner is entitled to the Writ of Certiorari because he has made a substantial

showing that he was denied his Sixth Amendment right to the effective assistance of conflict-free counsel given that his trial counsel operated under an unwaivable conflict of interest as admitted by the U.S. Government and the actual conflict adversely affected representation of the Defendant at trial.

Respectfully submitted,

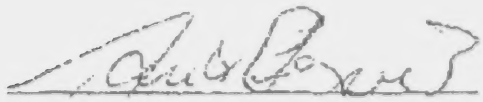


Javier
Re
No

Javier Lopera, No. 69502-004
Pro Se Petitioner
Northeast Ohio Correctional Center
2240 Hubbard Road
Youngstown, Ohio 44505-3157

CERTIFICATE OF SERVICE

I, JAVIER LOPERA, HEREBY CERTIFY that on this 22 day of September, 2010, I mailed via express mail a copy of the foregoing motion, exhibits, and certiorari petition to: Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530-0001.



Javier' Lopera, Pro Se Petitioner.

APPENDIX A - LOWER COURT ORDER ISSUED BY SINGLE JUDGE OF UNITED STATES COURT OF APPEALS FOR ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-12320-E

JAVIER LOPERA,

Petitioner-Appellant,

Versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the

Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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September 14, 2007

Clarence Maddox
Clerk, U.S. District Court
301 N MIAMI AVE. STE 150
MIAMI FL 33128-7788

Appeal Number: 07-12320-E
Case Style: Javier Lopera v. USA
District Court Number: 06-22504 CV-PCH SECONDARY
CASE NO: 02-20867 CR-PCH

The enclosed certified copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Also enclosed is the record on appeal, which consists of: 1 Box

Original Papers

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Gloria Powell (404) 335-6184

Encl.

APPENDIX B - REPORT & RECOMMENDATION OF MAGISTRATE AND COURT ORDER ADOPTING REPORT & RECOMMENDATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 06-22504-CIV-HUCK/SIMONTON

JAVIER LOPERA, Movant,

vs.

UNITED STATES OF AMERICA, Respondent.

ORDER DENYING MOTION TO VACATE

THIS cause is before the Court on Movant Javier Lopera's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Motion"), filed October 10, 2006 (D.E. # 1). In summary, Lopera contends that his conviction and sentence should be vacated because his constitutional right to effective assistance of counsel was violated because (1) his lead trial counsel had an unwaivable conflict of interest, and if waivable, Lopera did not knowingly and intelligently waive that conflict of interest; and (2) his appellate counsel was unconstitutionally ineffective for failing to assert in Lopera's opening appellate brief a sentencing issue in anticipation of Blakely v. Washington, 542 U.S. 961 (2004) and United States v. Booker, 543 U.S. 220 (2005).

On October 10, 2006, the Motion was referred to Magistrate Judge Andrea M. Simonton for a report and recommendation. On March 2, 2007, Magistrate Judge Simonton issued her Report and Recommendation ("Report"). This Court has now completed its de novo review of this matter. It has reviewed the Motion, the government's response, the Report, Lopera's Objections to and Appeal from Magistrate's Report, Lopera's Supplemental Objections to the Report, and pertinent portions of the record, including transcripts of various hearings before the Court and Magistrate Judge William Turnoff.

The Court has determined that in her Report, Magistrate Judge Simonton has thoroughly and accurately set forth the facts pertinent to resolution of the Motion, has thoughtfully and fairly analyzed the legal issues raised by the Motion, and has offered recommendations which are compelled by those findings of fact and conclusions of law. Consequently, the Court adopts by reference those findings of fact and conclusions of law with the following additional comments. The Court had the

opportunity to closely observe at trial the active interrelationship among Lopera and his three trial counsel. The Court is now and was at the time of Lopera's trial convinced beyond any reasonable doubt that Lopera, an experienced attorney, who from all appearances actively communicated with and engaged with all three of his trial counsel during the trial (on most occasions with lead trial counsel Vincent Flynn and Walter Reynosa during the actual trial), was fully aware of the issues involved in his potential conflict with Mr. Reynosa, but knowingly, intelligently, and purposefully waived any such conflict of interest. Accordingly, the Court rejects Lopera's claim based on a conflict of interest with Mr. Reynosa.

With regard to the second claim based on appellate counsel's failure to anticipate Blakey and Booker, the Court now notes that it would not have given Lopera a lesser sentence even if Blakely and Booker had been decided and argued at sentencing or upon re-sentencing. It is the Court's view now, as it was at the time the Court granted a relatively insignificant upward departure from the sentencing guidelines, that the

sentence imposed was lenient in view of the egregious and extensive nature of Lopera's criminal activity. Therefore, there could be no prejudice to Lopera for his appellate counsel's failure to anticipate Blakely and Booker.

Accordingly, Lopera's second claim is rejected.

Finally, the Court's review of the Report confirms that the present record is more than adequate for purposes of resolving the Motion and that an evidentiary hearing is unnecessary.

Conclusion

For the reasons discussed above, and as more fully developed in the Report, the Court overrules Lopera's objections, adopts the findings of fact and conclusions of law set forth in the Report and denies the Motion.

DONE AND ORDERED in Miami, Florida, this 20th day of March, 2007.

Paul C. Huck
United States District Judge

Copies provided to:
Magistrate Judge Simonton
Counsel of Record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06.22504-CIV-HUCKISIMONTON

(02.20867-CR-HUCK)

JAVIER LOPERA,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

Presently pending before this Court is Petitioner Javier Loperais Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE #1). This matter is referred to theundersigned Magistrate Judge (DE # 6), The motion is fully briefed (DE ## 2, 5, 13). For the reasons stated below, the undersigned recommends that the Motion be DENIED.

1. Background

On March 21, 2003, Petitioner Javier Loperalhereatter Lopera), an attorney specializing In immigration law, was

charged in a nineteen count Superseding Indictment with one count of conspiracy to make false statements, engage in visa fraud, and harbor aliens, in violation of 18 U.S.C. §§ 1001 and 1546(a) and 8 U.S.C. §§ 1324(a)(1)(A)(iii) and 1324(a)(1)(B)(i), ail in violation of 18 U.S.C. § 371 (Count 1); eleven counts of making false statements in matters within the jurisdiction of the Immigration and Naturalization Service (hereafter INS), in violation of 18 U.S.C. §§ 1001 and 2 (Counts 2 through 12) and seven counts of harboring aliens, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iii) and 1324(a)(1)(B)(i) (Counts 13 through 19). The Superseding Indictment charged conduct beginning in and about August 2000 and ending on or about February 19, 2003 (Case No. 02.20867-CR•HUCK, DE /4 23).

Before trial, on May 2, 2003, the government flied a sealed motion to disqualify attorney Walter Reynoso, Lopera's lead counsel, on the grounds that attorney Reynoso had a conflict of interest in that he was alleged to have filed false INS applications on behalf of Lopera in November 1994 and March 1996 and that the possibility of attorney Reynoso being

mentioned either in the government's case-in-chief or as impeachment evidence might prejudice Lopera (Case No. 02-20867-CR-HUCK, DE # 57).[1] On May 6, 2003, Lopera filed a sealed response (Case No. 02.20867•CR-HUCK, DE # 61).

On May 12, 2003, the Magistrate Judge held a hearing on the motion for disqualification (Case No. 02-20867-CR-HUCK, DE # 77). At the hearing, the government argued that the potential conflict of interest was not waivable, and attorney Reynoso should be disqualified. Lopera was represented at this hearing by three attorneys: Scott Srebnick, Esq., Vincent Flynn, Esq., and Walter Reynosa, Esq. Lopera's counsel, primarily attorney Srebnick, argued that the evidence regarding attorney Reynosa should not be admitted,

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[1] On the same day, the government also filed a notice of intent to introduce evidence pursuant to Fed.R.Evid. 404(b), that Lopera had obtained his green card by means of false statements and/or fraud (Case No. 02-20867-CR-HUCK, DE # 58).

and that, therefore, there was no conflict. The Magistrate Judge denied the government's motion, holding that Lopera's choice of counsel was fundamental and that the evidence the government intended to introduce at trial regarding attorney Reynoso probably should not be admitted at trial pursuant to Fed.R.Evid. 404(b), The Magistrate Judge also conducted a colloquy with Lopera in which he discussed with Lopera the prospect that a conflict of interest might be created if the District Court believed that attorney Reynoso's testimony would be admissible, or if Lopera wished to testify on his own behalf. The Magistrate Judge outlined various scenarios to determine whether Lopera was knowingly and intelligently waiving the conflict of interest. And found that Lopera had knowingly and intelligently waived the potential conflict of interest (Case No. 02-20867.CR-HUCK, DE # 77).

The government then filed an objection to the Magistrate Judge's order, contending that the Magistrate Judge incorrectly found that there was no actual conflict of interest and that attorney Reynosa should be disqualified. The government also

contended that the conflict of interest could not be waived, and that, in the alternative, that the waiver colloquy conducted by the Magistrate Judge was insufficient (Case No. 02.20887-CR-HUCK, DE # 78).

The trial began on May 19, 2003 (Case No. 02.20867-CR-HUCK, DE # 78). Before a jury was empaneled, the District Court, at the government's request, again addressed attorney Reynoso's possible conflict of interest and conducted another waiver colloquy. Lopera stated that he understood the possible conflict and the possible consequences, and again expressed his desire to keep attorney Reynosc as co-counsel (Case No. 02-20887-CR-HUCK, DE #154).

On May 23, 2003, the jury convicted Lopera on all counts (Case No. 02-20867-CRHUCK, DE # 95). Lopera did not testify at trial, At the trial, the government did not present any evidence concerning attorney Reynoso's alleged involvement with Lopera in fraudulent activities.

On August 28, 2003, the Court sentenced Lopera to concurrent terms of 60

months' imprisonment on Counts 1 through 12, and 100 months' imprisonment on Counts 13 through 19, all to run concurrently, followed by concurrent terms of 3 years of supervised release on each count; a special assessment of $1,900,00 and a fine of $12,500.00 (Case No. 02-20867-CR-HUCK, DE # 118). At sentencing, the District Court increased Lopera's base offense level by 1) nine levels for a conspiracy involving more than 100 alleged fraudulent petitions; 2) four levels for being a leader to organizer; 3) two levels for abuse of a position of trust; and 4) two levels for attempting to obstruct justice. The District Court also granted the government's motion for an upward departure based on the numbers of petitions and the disruption of a governmental function, thus increasing Lopera's sentence from 97 months to 100 months (Case No. 02-20867-CR-HUCK, DE # 143 at 32-37).

Lopera appealed from the judgment (Case No. 02.20867-CR-HUCK, DE # 119). On January 28, 2004, Lopera's appellate counsel, AFPD Timothy Cone, filed a brief raising one issue, whether harboring aliens under 8 U.S.C. § 1324(a)(1)(A)(iii)

includes employing illegal aliens, failing to take deductions from their paychecks, and filing false documents on their behalf.

On June 24, 2004, the United States Supreme Court entered its opinion in Blakely v. Washington, 542 U.S. 961 (2004). On June 30, 2004, Lopera's appellate counsel submitted a letter to the United States Court of Appeals for the Eleventh Circuit which contended that at sentencing, the District Court had enhanced the sentence based on 1) using more than 100 fraudulent petitions, 2) being a leader/organizer; 3) abusing a position of trust; and 4) obstruction of justice, that all of these determinations were based on facts not charged in an indictment or presented to a jury, and, thus, Lopera's sentence was invalid under Blakely. Lopera moved to vacate his sentence and remand for proceedings in accordance with Blakely. On July 9, 2004, the government filed a motion to strike Lopera's supplemental letter, noting that the letter did not have any bearing on the issue which Lopera had raised on appeal, and that it represented an improper attempt to amend his brief by adding a new issue. On August 24, 2004, the Eleventh Circuit

granted the government's motion and struck Lopera's June 30, 2004 letter.

On July 8, 2004, the Eleventh Circuit issued its opinion affirming Lopera's conviction but remanding for correction of a clerical error in the judgment (Case No. 02- 20867-CR-HUCK, DE* 147). See United States v. Lopera, 112 Fed. Appx. 2 (11th Cir. 2004). On July 19, 2004, Lopera filed a petition for panel rehearing, contending that the sentence enhancements imposed by the trial court violated Blakely. On August 13, 2004, the Eleventh Circuit denied Lopera's petition for rehearing.
On August 19, 2004, Lopera filed a petition for certiorari, which again raised the Blakely issue. On January 24, 2005, the United States Supreme Court vacated the Eleventh Circuit's decision and remanded the case back to the Eleventh Circuit for reconsideration In light of United States v. Booker, 543 U.S. 220 (Jan. 12, 2005). See Lopera v. United States, 543 U.S. 1112 (2005).

On May 11, 2005, the Eleventh Circuit, after supplemental briefing, issued an opinion again affirming the

District Court's conviction and sentence. The Eleventh Circuit, relying on United States v, Levy, 416 F.3d 1273 (11th Cir.), cert. denied, 126 S.Ct. 643 (2005), held that Lopera had waived his sentencing arguments by falling to raise them in his initial brief on direct appeal. The court again remanded with instructions to fix the clerical error in the judgment (Case No. 02.20867-CR-HUCK, DE # 149). See Lopera v. United States, 128 Fed. Appx. 761 (11th Cir. 2005).[2] On October 11, 2005, Lopera's subsequent petition for certiorari was denied. See Lopera v, United States, 126 S.Ct. 447 (2005).

On October 10, 2006, Lopera timely filed this motion.

II. The Positions of the Parties

A. Lopera's Position

Lopera alleges that his conviction and sentence should be vacated on two grounds. First, Lopera contends that his constitutional right to the effective assistance of counsel was violated because: 1) the conflict of interest with attorney Reynoso was unwaivable and was a per se violation of the Sixth Amendment (DE # 2 at 1.5; DE # 13 at 34); 2) there was an

actual conflict of interest which had an adverse effect on attorney Reynoso's performance (DE # 2 at 5-7; DE # 13 at 7-8); and 3) Lopera's waiver was insufficient (DE # 2 at 7.11; DE # 13 at 8-10). Second, Lopera contends that his appellate counsel was ineffective for failing to raise a sentencing issue in his opening appellate brief (DE # 2 at 11.13; DE # 13 at 10-13). Lopera also contends that an evidentiary hearing is necessary (DE # 13 at 1-3).

B. The Government's Position

The government asserts that: 1) Lopera's right to effective assistance of counsel was not violated due to an unwaivable conflict of interest, 2) there was no actual conflict of interest; and 3) Lopera waived any potential conflict of interest,

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[2] On July 22, 2005, the District Court entered an Amended Judgment correcting the clerical error (Case No. 02-20867-CR-HUCK, DE # 150).

(DE # 5 at 21-23).

Next, the government asserts that Lopera is precluded from attacking in this motion his sentence, which was within the statutory limits (DE # 5 at 18-21). The government also contends that Lopera's appellate counsel was not ineffective for failing to predict the Supreme Court's ruling in Blakely v. Washington, 542 U.S. 961 (2004) (DE # 5 at 21-23). Finally the government asserts that there is no reasonable probability that a different sentence would have resulted if the District Court had applied the sentencing guidelines to Lopera as discretionary instead of as mandatory (DE # 5 at 21-23).

Legal Analysis

A. Lopera Has Not Shown That Attorney Reynoso Provided Ineffective Assistance of Counsel Due To A Conflict of Interest

Lopera has not made cut any conflict of interest with his lead trial attorney, Walter Reynoso, that would require vacating his conviction. The record indicates that the conflict of Interest was not so severe as to mandate the per se disqualification of attorney Reynosa, without permitting a waiver of the conflict.

Lopera has not shown the actual conflict of interest affected attorney Reynosa's performance. Lopera has not shown what meritorious defense he lost by not testifying, and has not shown any connection between his failure to testify and the conflict of interest, as the trial record indicates that Lopera decided not to testify at trial after consulting with attorney Reynoso and co-counsel Vincent Flynn. Finally, Lopera, an attorney, knowingly and intelligently waived any conflict of interest, and stated repeatedly, after being informed of the conflict, that he wanted attorney Reynoso to continue as his attorney.

1. Background

The government sought to Introduce at trial evidence that in 1994 and 1996, years before the acts alleged In the indictment, Lopera had committed fraud, with the witting or unwitting assistance of attorney Reynosa, in relation to filing petitions for Lopera with the immigration end Naturalization Service (INS). The government sought to introduce this evidence either pursuant to Fed.R.Evid. 404(b) or to impeach Lopera if he testified. The government also sought to disqualify attorney

Reynosa based on this evidence.

The evidence was not admitted pursuant to Fed.R.Evid. 404(b) and Lopera did not testify. The motion to disqualify attorney Reynoso was referred to the Magistrate Judge. The Magistrate Judge denied the motion to disqualify, and opined that the evidence would not be admitted at trial, pursuant to Fed.R.Evid. 404(b), The Magistrate Judge also conducted a colloquy during which Lepers waived his right to conflict-free counsel.

The government appealed to the District Court the Magistrate Judge's ruling denying the motion to disqualify attorney Reynoso. The District Court affirmed the Magistrate Judge, and also conducted a colloquy during which Lopera waived his right to conflict-free counsel. The 404(b) evidence was not admitted at trial. Lopera did not testify at trial, During a colloquy with the Court ensuring that it was Lopera's decision not to testify, attorney Reynoso stated, in the presence of Lopera and co•counsel Vincent Flynn, that Reynoso, Lopera, and Flynn had thoroughly discussed the matter.

2. <u>There Was No Actual Conflict of Interest</u>

The undersigned finds that there was an actual conflict of interest at trial, While the District Court did not admit the Rule 404(b) evidence, if Lopera had testified, that evidence may well have been admitted to impeach Lopera's credibility. This would have brought attorney Reynoso's name into the case. Lopera contends that there was an actual conflict of interest which had an adverse effect on attorney Reynoso's performance in that even though Lopera wanted to testify at trial, at the direction of [1]attorney Reynoso, Lopera did not testify. The undersigned finds that Lopera has not shown why his testimony at trial would have constituted a plausible alternative defense strategy or tactic. The undersigned also finds that there was no link between the actual conflict and Lopera's decision not to testify, as the trial record shows that before deciding not to testify, Lopera consulted both with attorney Reynoso and with attorney Flynn who was an independent counsel.

In Wheat v. United States, 486 U.S. '153 (1988), the United States Supreme Court addressed the circumstances

under which disqualification of criminal defense counsel is appropriate. The Supreme Court held that a District Court may disqualify a criminal defendant's counsel of choice based upon a showing of a serious potential for conflict of interest, even where the defendant and the affected co-defendants/potential witnesses sought to waive the right to conflict-free counsel. In reaching this result, the Court emphasized that, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefe 486 U.S, at 159. Recently, in United States v. Gonzalez-Lopez, 126 S.Ct 2557 (2006), the Supreme Court addressed the importance of allowing a defendant the right to be represented by his counsel of choice. The Supreme Court held that a defendant who does not require appointed counsel may choose who will represent him. Id, at 2561. The Supreme Court also held that when the trial court erroneously disqualifies a defendant's counsel of

choice, the erroneous disqualification Is a per se violation of the Sixth Amendment right to counsel of choice, and the defendant does not need to show any prejudice from the deprivation. Id. at 2562, 2563-65, The Supreme Court stated that the Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel ha believes to be best." Id. at 2562.

In order for Lopera to prove that Reynoso's conflict of interest had an adverse effect on attorney Reynoso's performance, depriving Lopera of the effective assistance of counsel, Lopera must show: 1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; 2) that the alternative strategy or tactic was reasonable under the facts; and 3) a link between the actual conflict and the decision to forego the alternative strategy or defen se. See Pegg v. United States, 253 F.3d 1274, 1278 (11th Cir. 2001), cert. denied, 535 U.S. 970 (2002). However, Lopera has not shown the existence of a plausible alternative defense

strategy or tactic that might have been pursued and that was reasonable under the facts. Lopera only alleges that he did not testify at trial, even though he wished to, solely because attorney Reynoso advised him not to testify. He does not show, or attempt to show, why or how this was a reasonable alternative strategy, or what he would have testified to.[3] This alone would suffice to deny the instant motion.

Moreover, the trial record belies Lopera's allegation that he did not testify based solely on attorney Reynoso's advice, The record indicates that Lepers decided not to testify after consulting with both attorney Reynoso and attorney Flynn. At the close of the defense case, the District Court conducted a

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[3] Lopera's defense at trial was that he had lost control of his office, and that government witnesses Tania Cascais and Vaiquir Marquez, two of Lopera's former office managers, were the true guilty parties (Case No. 02-20867-CR-HUCK, DE # 142 at 26-45).

colloquy with Lopera concerning his decision not to testify. During the colloquy, Lopera stated that:

1) he had discussed with his counsel whether it was in his best interest to testify; 2) he had discussed with his counsel the pros and cons as to testifying and not testifying; 3) he understood that it was his ultimate decision whether to testify, after consulting with his attorney; and 4) he understood that he had no obligation to testify and that the jurors would be instructed that they could not take that fact into account (Case No. 02-20867- CR-HUCK, DE # 142 at 4). Lopera also stated that he was satisfied that he had thoroughly discussed that issue with his counsel and that he was satisfied with his decision not to testify. Attorney Reynoso then stated, For the record, both myself and Mr. Flynn have thoroughly discussed the matter with Mr. Lopera and we're confident he understands one hundred percent the decision not to testify and his rights and consequences thereof (Case No. 02.20867-CR-HUCK, DE # 142 at 5) (emphasis added).

Lopera has not alleged any conflict of interest or

ineffective assistance with regard to his representation by attorney Flynn. The undersigned also notes that while Lopera describes attorney Reynoso as the lead trial counsel, attorney Flynn conducted most of the trial for Lopera. Attorney Flynn cross-examined both of the government's witnesses at the motion to suppress, and, at trial, conducted voir dire, made the opening statement, closing argument and the motions for acquittal, and cross-examined 18 of the government's witnesses, including Tania Cascais and Valquir Marquez, two of Lopera's former office managers, whom attorney Flynn claimed in Lopera's closing were the true guilty parties (Case No. 02-20867-CR-HUCK, DE # 142 at 26-45). At trial, Attorney Reynoso examined both of the defense witnesses and cross-examined 6 of the government's witnesses. Attorney Scott Srebnick, who did not file a notice of appearance, flied malty of the motions and responses for the defense, argued Lopera's motion to suppress evidence and Lopera's response to the motion to disqualify attorney Reynoso, and also prepared the jury instructions. Thus, it appears that

Lopera's decision not to testify was based, in part, on consultation with independent and unconflicted counsel, that is attorney Flynn. See Pegg, 253 F.3d at 1278 (one factor in finding that the conflict of interest had not adversely affected counsel's representation was that petitioner had the advice of several attorneys); accord United States v. Boswell, 2006 WL 3780534 (N.D. Fla. Dec. 19, 2006) (same). Therefore, the undersigned finds that Lopera was not prejudiced by attorney Reynoso's conflict of interest.

Lopera also contends that attorney Reynosa's conflict or interest was unwalvable and represented a pease violation of the Sixth Amendment because Reynoso participated in the other crimes evidence which the government sought to introduce and such evidence might be admissible if Lopera testified. In support of this argument, Lopera asks this Court to apply the Second Circuit's rule that a conflict of interest may be unwaivable and represent a per se violation of the Sixth Amendment where the attorney 1) is not licensed; or 2) has engaged in crimes which are the same or closely related to the

defendant's crimes. See United States v. Williams, 372 F.3d 96, 102-03 (2d Cir. 2004); United States v. Putters, 5 F 3d 605, 611 (2d Cir. 1993); United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), and United States v. Urbana, 770 F.Supp 1552 (S.D. Fla. 1991). However, the Eleventh Circuit has not adopted this rule. See United States v. Pegg, 253 F.3d 1274, 1279 (11th Cir. 2001), cert. denied, 535 U.S. 970 (2002).[4]

In any event, because attorney Reynoso's conflict of interest was not related to the crimes with which Lopera was charged, but to acts which had occurred years prior to the acts charged in the Indictment, and because the government did not claim that Reynoso had intentionally commytted fraud in these acts, the conflict of interest here was not unwaivable even if the Second Circuit's per se rule is applied. Therefore, the undersigned finds the attorney Reynoso's conflict of interest was

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[4]The Seventh Circuit has rejected the Second Circuit's per se rule, See United States v. Wallace, 276 F.3d 360, 368 (7th Cir.), cert. denied, 536 U.S. 924 (2002).

not unwaivabie and did not represent a per se violation of the Sixth Amendment.

3. Lopera Effectively Waived Any Conflict of Interest

In the alternative, the undersigned finds that Lopera effectively waived any conflict of interest in front of the District Court. In making this finding, the undersigned notes that Lopera is an attorney, that he had the advice of two independent counsel,attorney Srebnick and attorney Flynn, in making this waiver, and that the waiver colloquy was sufficient.

a. The Waiver Colloquy Before The District Court

At trial, while the District Court was considering the government's appeal from the Magistrate Judge's denial of the government's motion to disqualify attorney Reynoso, the government asked the District Court to redo the waiver hearing, assuming that the Court let Reynoso continue to represent Lopera. The District Court announced that it was not willing to revisit at that point the Magistrate Judge's ruling denying the admission of the 404(b) evidence, and that if Lopera wanted to

proceed with Reynosa as his lawyer, that was his right (Case No. 02-20867-CR-HUCK, DE # 154 at 7).

The District Court then conducted a waiver colloquy with Lopera. In response to the District Court's questions, Lopera stated that he understood that if he testified, the evidence about attorney Reynosa might come in to impeach Lopera, and Reynoso would be seated at counsel table, and that this might have an adverse impact upon Lopera In the eyes of the jury (Case No. 02-20867-CR-HUCK, DE # 154 at 10),. Still in response to the District Court's questions, Lopera stated that he understood that he also had attorneys Flynn and Srebnick as counsel, and that he could proceed with two lawyers instead of three (Case No. 02-20867-CR-HUCK, DE # 154 at 10-11), The District Court then told Lopera that Lopera had the right to choose his counsel and that he had chosen all three counsel because he believed they were the best team to represent him in this case, to which Lopera answered "Yes." Next, the District Court asked Lopera if, knowing the potential problem he might have with regard to his prior INS application if it came in as

404(b) or impeachment, he still wished to proceed with attorney Reynoso as one of his co-counsel in this case, to which Lopera answered "Yes." The District Court then asked Lopera if there was anything he would like to discuss with the defense team about any potential problems he might have or the prejudice he might suffer as a result of having Reynoso continue to represent him under these circumstances, to which Lopera answered "No". Finally, the District Court asked Lopera, assuming that he know more than the Court knew concerning the application itself, did he still want Reynoso to continue as co-counsel. Lopera responded "Absolutely." (Case No. 02-20867-CR-HUCK, DE # 154 at 11). The District Court then asked the government and the defense, if there was anything else he needed to ask. Government counsel and defense attorneys Flynn and Reynoso each responded that there was not (Case No. 02.20867-CR-HUCK, DE # 154 at 11-12). The District Court then denied the government's motion to disqualify attorney Reynoso (Case No. 02-20867-CR-HUCK, DE # 154 at 12).

b. <u>The Waiver Colloquy Before The Magistrate Judge</u>

The undersigned also notes that at the hearing before the Magistrate Judge on the government's motion to disqualify attorney Reynoso, the Magistrate Judge discussed the same issues that were discussed in front of the District Court, and also conducted a waiver colloquy with Lopera. At this hearing, attorney Srebnick represented Lopera, and attorneys Flynn and Reynoso were present (Case No. 02-20867- CR-HUCK, DE # 77 at 17). In denying the motion to disqualify, the Magistrate Judge stated that if the District Court admitted the evidence, there was a possibility that Reynoso's name would come into the case, and the Magistrate Judge asked defense counsel if Lopera would then still want Reynoso as his attorney (Case No. 02-20867-CRHUCK, DE # 77 at 17-18). Attorneys Flynn and Srebnick each responded that there was no question of that and Flynn stated that he had discussed the Issue with Lopera (Case No. 02-20867-CR-HUCK, DE # 77 at 18). The government noted that if Lopera elected to take the stand, his decision to do so could be flavored by the fact that Reynoso was a potential witness to the event and could likely be called to shed light on

the extrinsic evidence. The government also opined that the conflict could not be waived because of the effect it might have on Lopera's decision to testify at trial (Case No. 02-20867-CR-HUCK, DE # 77 at 18.19).

In denying the motion to disqualify, the Magistrate Judge relied on, inter alia, the importance of Lopera's choice of counsel. The Magistrate Judge stated, "Lopera is an attorney. He knows more about these things than the average litigant. He knows what the clown side of having Reynoso as his attorney is, given the putative attempt by the government to introduce the 404(b) evidence at issue." (Case No. 02-20867-CR-HUCK, DE # 77 at 21). The Magistrate Judge also noted that the record contains the possibilities of what could occur in the event the District Judge admitted the 404(b) evidence, and stated that Lopera was fully advised of that possibility and had indicated, through counsel, that it was his desire to have Reynoso remain as his attorney (Case No. 02-20867-CR-1UCK, DE # 77 at 21-22). The Magistrate Judge then stated that he was satisfied that Lopera had waived any conflict of interest. Attorney Flynn stated, "We

agree, Your Honor. He is present. He is a lawyer." (Case No. 02.20867-CR-HUCK, DE # 77 at 27).

The Magistrate Judge then conducted a waiver colloquy, first eliciting Lopera's age and name (Case No. 02-20867-CR-HUCK, DE # 77 at 27-28). In response to the Magistrate Judge's questions, Lopera agreed that:

1) he had been present throughout the proceeding on the motion to disqualify Reynoso; 2) he had discussed the filing of the motion and his response to it prior to coming into court; 3) he had heard all of the issues raised by all the lawyers and by the court; 4) he understood that there was a potential of a conflict regarding Reynoso's continued representation of him, that Reynosa's name and actions might come up before the jury at his trial, and that Reynoso might even be called as a witness in this case; and 5) he understood that this might be prejudicial to him and/or a distraction for Reynoso, and might impact on ways unforseen in his defense (Case No. 02-20867-CR-HUCK, DE # 77 at 28-29). The Magistrate Judge then asked if Lopera had

any questions in this area about a possible conflict of interest. Lopera responded "No, I don't. I trust Reynoso. He is my counsel " Lopera also stated that he understood that if he was convicted, he, not Reynosa would go to jail (Case No. 02-20867-CR-HUCK, DE # 77 at 29). The Magistrate Judge then asked Lopera whether it was his desire to have Reynoso remain as one of his attorneys. Lopera exclaimed, "it is one of my greatest desires... I really want him to be my counsel" (Case No. 02-20867- CR-HUCK, DE # 77 at 29-30). The Magistrate Judge then asked Lopera if Reynoso was called as a witness at trial and was disqualified, would Lopera still want him to continue now as his counsel. Lopera responded that he would. (Case No. 02-20867-CR-HUCK, DE # 77 at 31). The Magistrate Judge then asked defense counsel if there was anything else • they wished to bring before the court or put on the record. Attorney SrebnIck stated there was nothing else (Case No. 02-20867-Cif-HUCK, DE # 77 at 33),

c. Lopera's Waiver Was Knowing, Intelligent and Voluntary

The Eleventh Circuit has held that in order to show a knowing, intelligent and voluntary waiver of the right to conflict-free counsel, the government must show that the defendant: 1) was aware that a conflict of Interest existed; 2) realized the consequences to his defense that continuing with counsel under the onus of a conflict could have; and 3) was aware of his right to obtain other counsel. Although the trial court does not have to accept a defendant's waiver, a criminal defendant has a presumptive right to counsel of choice, and court should hesitate to disqualify defense counsel. United States v. Garcia, 447 F.3d 1327, 1337 (11th Cir. 2006) (citations omitted).

Lopera knowingly, intelligently and voluntarily waived any objection to attorney Reynoso's conflict of interest. Lopera was an attorney. The District Judge held a detailed colloquy, and explained to Lopera that if he testified, the government might introduce impeachment evidence regarding Lopera's prior INS applications that might bring Reynosa into the case. Lopera told the District Court that he understood that in addition to

attorney Reynoso, he was also represented by attorneys Flynn and Srebnick, neither of whom had a conflict. The Court gave Lopera an opportunity to consult with any of his counsel about the potential problems or prejudice resulting from Reynoso remaining in the case. Finally, when the District Court asked Lopera if he still wanted Reynoso to remain in the case, Lopera responded, "Absolutely." (Case No. 02-20867-CR- HUCK, DE # 54 at 11). This colloquy was sufficient for Lopera to waive the conflict of Interest.

Moreover, the District Court colloquy did not take place in a vacuum, Lopera had previously waived the conflict of interest in a colloquy before the Magistrate Judge, in connection with the government's motion to disqualify Reynosa.[5] At this colloquy, Lopera was represented by his unconflicted counsel, attorneys Flynn and Srebnlck. In Lopera's presence, attorney Flynn told the Magistrate Judge that he had discussed with Lopera the possibility that Reynosa would become an issue in the case, and that Lopera still wanted Reynoso to continue as his counsel. Lopera heard government counsel argue that

Lopera's decision whether to testify could be affected by the fact that Reynoso was a potential witness regarding the extrinsic evidence, and that the conflict could not be waived because of the effect the conflict might have on Lopera's decision to testify, the exact same issue which Lopera raises here. The Magistrate Judge noted that Lopera was an attorney, knew more about the matters than the average defendant, and know the negatives of having Reynoso continue as his attorney because the know the negatives of having Reynoso continue as his attorney because the government had raised them at the hearing. When the Magistrate Judge stated that he was satisfied that Lopera had waived any conflict of interest, attorney Flynn stated that defense counsel agreed, that Lopera was present and that Lopera was a lawyer. During the colloquy, Lopera repeatedly

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[5] The undersigned rejects Lopera's contention that the government is stopped from using the colloquy before the Magistrate Judge because the government argued at trial that the colloquy before the Magistrate Judge was Insufficient.

stated that he understood the specifics of the conflict and that he trusted Reynoso and wanted Reynoso to continue as his lawyer.

Lopera had two waiver colloquies each before a separate Judge. In these colloquies, Lopera consistently stated that he understood the drawbacks of having a conflicted Reynoso continue as his lawyer. Lopera also stated that having Reynoso remain as his lawyer was one of his greatest desires. Therefore, the undersigned finds that Lopera's waiver of conflict-free counsel was knowing, intelligent and voluntary.

The undersigned rejects Lopera's contention that his waiver was insufficient because the District Court never explained to Lopera what might be the adverse impact of being impeached by the other crimes evidence if he testified and, that if Lopera wanted to testify, and the other crimes evidence was elicited, Lopera might want to have Reynoso testify. The record belies this assertion. These issues were explicitly raised at the colloquy before the Magistrate Judge. Lopera was informed of these issues and stated that he understood that if he testified, there might be an adverse impact from keeping Reynoso as

counsel.

Lopera's contention that he did not know that he could consult conflict-free counsel is without merit, Lopera was represented at both colloquies by Independent, conflict free counsel, attorneys Flynn and Srebnlck. At the colloquy before the Magistrate Judge, attorney Flynn stated that he had discussed the conflict Issue with Lopera. Therefore, the undersigned finds that, contrary to Lopera's assertions, he did consult with an independent lawyer regarding Reynosa's potential conflicts from whom he received detached advice about whether Lopera should testify.

Finally, Lopera has provided no authority to support his contention that the waiver was ineffective because he was not told that he could request a continuance if Reynoso was disqualified. In any event, Lopera stated that he understood that he could continue with attorney Flynn and Srebnick if Reynosa was disqualified. In any event, attorney Flynn conducted the majority of the trial for Lopera,

B. Lopera Did Not Receive ineffective Assistance of

Appellate Counsel

Lopera is not entitled to relief because his claim that he received Ineffective assistance of appellate counsel is without merit. He claims that his appellate counsel rendered ineffective assistance by failing to raise in his appellate brief a constitutional challenge to the sentencing court's use of mandatory sentencing guidelines. However, Lopera is unable to show either that his appellate counsel's representation fell below an objective standard of reasonableness or that, but for the alleged deficiency in his appellate representation, there is a reasonable probability that the result of the proceeding would have been different.

The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. Matire v, Wainwright, S11 F.2d 1430, 1435 (11th Cir. 1987). That is, the movant must establish that (1) his appellate counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability that the result of the

proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

1. The Representation by Lopera's Appellate Counsel Did Not Fall Below An Objective Standard of Reasonableness

Initially, Lopera contends that his appellate counsel, AFPD Timothy Cone, was ineffective because attorney Cone did not argue in his opening appellate brief that the sentencing court had improperly treated the Sentencing Guidelines as mandatory, requiring Lopera to be resentenced. However, the record demonstrates that attorney Cone's performance was not deficient.

Attorney Cone was not deficient for not arguing in Lopera's opening brief that the sentencing court had improperly treated the Sentencing Guidelines as mandatory. First, this argument was not preserved for appeal, as Lopera's sentencing counsel had not raised that argument at sentencing. Next, under the law of this Circuit, attorney Cone cannot be considered ineffective for not predicting in January 2004 that the United States Supreme Court would decide Blakely v.

Washington, 542 U.S. 961 (2004) almost six months later, and United States v. Booker, 543 U.S. 220 (2005) almost one year later. See Black v. United States, 373 F.3d 1140, 1146 (11th Cir. 2004) (appellate counsel's performance was not deficient for failing to predict, what was not yet a certain holding), cert. denied, 543 U.S. 1080 (2005); accord United States v. Ardley, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J,, concurring in the denial of rehearing en bane), cert. denied, 535 U.S 979 (2002); Davis v. United States, 2007 WL 445451 at *5 (M.D. Ala. Feb. 8, 2007) (Section 2255 petitioner's appellate counsel was not ineffective for having failed to raise a Blakely issue on appeal before Blakely was decided but after certiorari had been granted in Blakely) .

In fact, attorney Cone diligently sought to raise Blakely as soon as it was decided. Immediately after Blakely was decided, and before the Eleventh Circuit affirmed Lopera's conviction, attorney Cone attempted to raise the Blakely issue by filing a notice of supplementary authority, which was stricken on the government's motion. After the Eleventh Circuit affirmed

Lopera's conviction, attorney Cone raised the Blakely issue in a petition for panel rehearing, which was denied. Attorney Cone then filed a petition for certiorari, which was granted, and the case was remanded to the Eleventh Circuit to reexamine Lopera's appeal in light of Booker. On remand, attorney Cone argued that Lopera should be resentenced. While the Eleventh Circuit held that Lopera's failure to raise the sentencing issue in his opening appellate brief resulted in a waiver, this does not show that attorney Cone was ineffective, only that he was unsuccessful.

Lopera misplaces his reliance on Breen v. United States, 2006 WL 238994 (S.D.N.Y. Jan. 31, 2006), to support his contention that attorney Cone was ineffective for failing to raise Blakely on appeal before It was decided. In denying Bretan's §2255 petition, the district court held, inter alla, that after the Supreme Court had granted certiorari in Blakely, Bretan's counsel was deficient at sentencing for not having raised a Blakely issue at sentencing. kl, at 6-7. In making this finding, the court noted both that the law in the Second Circuit was that

an attorney's failure to predict changes in the law did not constitute ineffective assistance of counsel, and that the prevailing view among the district courts in the Second Circuit was that failure to anticipate Blakely and Booker at sentencing or on appeal did not constitute ineffective assistance of counsel, even when the failure occurred after certiorari was granted in Blakely. Id at 6, fns. 44, 45.

Thus, Lopera is relying on a district court decision which concedes that it represents the minority view in its circuit. Moreover, the district courts in this Circuit which have construed the same issue raised in Bretan have agreed with the majority of the district courts in the Second Circuit that trial counsel was not ineffective for having failed to raise a Blakely issue at sentencing before Blakely was decided but after certiorari had been granted in Blakely. See McKee v. United States, 2007 WL 445446 at *3 (M.D. Feb. 8, 2007) (Section 2255 petitioner's trial counsel was not ineffective for having failed to raise a Blakely issue at sentencing before Blakely was decided but after certiorari had

been granted In Blakely); Ennis tr. United States, 2006 Wt_ 2715126 at *3-4 (S.D. Ala. Sept. 22, 2006) (same).

Finally, in Bretan, the ineffective assistance issue went to the performance of counsel at sentencing. Here, the ineffective assistance issue goes to the performance of appellate counsel after sentencing counsel failed to raise at sentencing the issue of the constitutionality of mandatory sentencing guidelines. As previously stated, the fact that Lopera's sentencing counsel did not raise the Blakely issue is one more factor indicating that attorney Cole was not deficient for failing to raise on appeal an unpreserved issue.

2. Lopera Is Unable To Show That, Absent The Alleged Deficient Performance By His Appellate Counsel, He Would Have Received A Lower Sentence

In any event, Lopera is unable to show that absent the alleged deficient performance of attorney Cone, he would have received a lower sentence.

The parties appear to agree that the prejudice issue should be determined by applying the test which the Eleventh

Circuit laid out in United States v. Rodriguez, 398 F.3d 1291, 1292 (11' Cir.), cert. denied, 545 U.S. 1127 (2005).

In Rodriguez, the defendant appealed his sentence alleging, inter elle, a violation pursuant to Blakely and Booker[6]. The Eleventh Circuit noted that defendant had not preserved this issue for review because the defendant had not made this objection in the district court. 398 F.3d at 1297-98. The Eleventh Circuit therefore examined defendant's contention for plain error. Id, at 1298. The appellate court found that the defendant met the first prong of the plain error standard because his sentence was enhanced under a mandatory guidelines system as a result of findings made by a judge that went beyond the facts admitted by the defendant or found by a jury, in violation of Booker. Id. at 1298. The court found that the defendant met

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[7]The Eleventh Circuit also affirmed the defendant's sentence on the only preserved issue, whether the district court erred in its factual determination of the drug quantity for which the defendant was responsible. 398 F.3d at 1296.97.

the second prong of the plain error standard because while the error was not plain at the time of sentencing, it had become plain at the time of appellate consideration, after Booker was decided. Id. at 1299. However, the Eleventh Circuit then found that the defendant failed to meet the third prong of the plain error standard; that the error must have affected the outcome of the district court proceedings, Id. at 1299-1300, The court noted that this was a heavy burden which the defendant must prove. The court stated that the error was that extra-verdict enhancements were used in a mandatory guidelines system. Id. at 1300. The court continued that If the same extra-verdict enhancements had been used in a non-mandatory guidelines system, their use would not have implicated the Sixth Amendment, Therefore, in determining whether to vacate the sentence, the appellate court had to ask whether there was a reasonable probability of a different result if the district court had applied the guidelines in an advisory instead of binding fashion. The court determined that the record provided no

reason to believe that the district court would have sentenced below the guideline range. Because of this, the Eleventh Circuit found that the defendant had not met his burden of showing a reasonable probability that the sentence would have been lower but for the error, and that the defendant was not entitled to be resentenced. Id, at 1300-02, 1206.

Lopera, too, has not met his burden of showing a reasonable probability that the sentence would have been lower but for the binding application of the guidelines. At sentencing, the District Court here granted the government's motion for an upward departure from the upper guideline range of 97 months imprisonment, which was based on significant disruption of government function and conduct involving more than 100 fraudulent petitions (Case No. 02.20867-CR-HUCK, DE # 143 at 36). Even though the government requested the statutory maximum of 120 months imprisonment, the District Court only increased the sentence to 100 months imprisonment (Case No. 02-20867-CRHUCK, DE # 143 at 34-36). The fact that the District Court granted the upward departure from the guideline

maximum shows that there is no reasonable probability that Lopera's sentence would have been lower but for the binding application of the guidelines.

At the sentencing hearing, the government presented evidence supporting the upward departure, including two witnesses (Case No. 02-20867-CR-HUCK, DE # 143 at 9-22). The District Court then found, by a preponderance of the evidence, that Lopera had submitted substantially more than 100 documents to the Bureau of Citizen and Immigration Service (BCIS) (DE # Case No. 02-20867-CR-HUCK, DE # 143 at 23, 28-29, 32, 36).[7] The District Court also found that the large number of fraudulent petitions submitted by Lopera had created a substantial disruption of the activities of the BCIS' Dallas, Texas Service Center (Case No. 02.20867-CR-HUCK, DE # 143 at 23, 28.29, 34, 36).

In granting the upward departure, the District Court

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[7]BCIS is the successor agency to the Immigration and Naturalization Service.

stated that until he heard the evidence which the government had presented at the sentencing hearing, he had not realized that Lopera's fraud was so widespread, The District Court celled the case one of the worst which he had seen, characterized the case as unprecedented, and stated that Lopera had no compunction about doing what suited him at other people's expense (Case No 02-20867-CR-HUCK, DE # 143, at 30, 33-34). Lopera's reliance on United States v. Shelton, 400 F.3d 1325 (11th Cir. 2005) is misplaced, as it is factually distinguishable from the instant case. In Shelton, the Eleventh Circuit vacated the defendant's sentence and remanded for resentencing based on Booker. The appellate court found that the defendant had shown that the sentencing court's use of a mandatory, as opposed to an advisory Guidelines scheme actually affected the proceedings. 400 F.3d at 1332. The Eleventh Circuit based its findings on the sentencing court's several expressions during sentencing that the sentence required by the Guidelines was too severe, and on the fact that the sentencing court gave the

defendant the sentence at the bottom of the Guideline range, and also stated that the sentence was more than appropriate under the case. Id.at1332-33. [8]

Lopera contends that the District Court might give him a lower sentence on resentencing. In making the argument, Lopera relies upon the District Court's statement at the sentencing, made when considering the government's upward departure motion, that the guideline range of 97 months is at the top of the guidelines, and that Lopera was likely to be deported after serving his sentence (DE # 13 at 11-12). The District Court, then asked the government if a sentence of 120 months, as opposed to a sentence of 97 months, would really accomplish anything (Case No. 02-20867-CR-HUCK, DE # 143 at 29- 30).

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[8]The Eleventh Circuit also found, under the fourth prong of plain error review, that the plain error at sentencing seriously affected the fairness, integrity or public reputation of judicial proceedings. 400 F.3d at 1333-34.

However, Lopera ignores the fact that after making the above statements, the District Court granted the upward departure motion, and sentenced Lopera above the guideline range, though not as severe an upward departure as the government had requested. In granting the upward departure, the District Court stated Lopera's fraud was very widespread, characterized the case as unprecedented and as one of the worst which he had seen, characterized, and stated that Lopera had no compunction about doing what suited him at other people's expense.

As the Eleventh Circuit held when construing the identical issue in United States v. Fields, 408 F.3d 1356, 1360 (11th Cir.), cert. denied, 126 S.Ct. 221 (2005), "Where Twje just don't know' whether the defendant would have received a lesser sentence if the guidelines had been advisory, the defendant has not met his burden of showing prejudice", citing United States v. Rodriguez, 393 F.3d at 1301. Therefore, In light of the District Court's granting the motion for upward departure and then sentencing Lopera above the guideline range, the undersigned

finds that Lopera has not met his burden of showing that there was a reasonable probability that he would have received a lower sentence if the District Court had applied the guidelines in an advisory instead of binding fashion.

C. Lopera Is Not Entitled To An Evidentiary Hearing

Lopera is not entitled to the requested evidentiary hearing because the undersigned has determined that the record conclusively demonstrates that Lopera is not entitled to relief. See Smith v. Singletary, 170 F.3d 1051, 1053.54 (11' Cir. 1991).

IV. Conclusion

Therefore, for the reasons stated above, it is hereby **RECOMMENDED** that Javier Lopera's Motion to Vacate Sentence Pursuant to 28U.S.C, § 2255 (DE # 1), be **DENIED**.

The parties will have ten days from the date of service of this Order within which to file written objections, if any, for consideration by the Honorable Paul C. Huck, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained

herein. LaConte tf. Dugger, 847 F.2d 745 (11th Cir,), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, inc., 996 F.2d 1144,1149 (11' Cir. 1993).

DONE AND SUBMITTED in Miami, Florida, on March 2, 2007

ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies to:
The Honorable Paul C. Huck
United States District Judge
All counsel of record